IN THE HIGH COURT OFBOMBAY AT GOA

SECOND APPEAL NO. 26 OF 1999

1. Shri John Claro Fernandes,
   major and

2. Shri Peter Fernandes,
   major,

   Both residing at Colleamordi,
   Amona, Quepem. … Appellants/Defendants

versus

1. Smt. Luizinha Azavedo,
   60 years of age, widow and

2. Smt. Dumiana Ferrao,
   70 years of age, widow,

   Both residing at Colle-amordi,
   Amona, Quepem. … Respondents/Plaintiffs

Mr. M. S. Sonak and Mr. P. S. Rao, Advocates for the Appellants.

Mr. V. P. Thali and Ms. Gandhali Pednekar, Advocates for the Respondents.

CORAM : N. A. BRITTO, J.

DATE : 21ST OCTOBER, 2004.

ORAL JUDGMENT

This is Defendants' second appeal arising from R.C.S. No.46/1988/B.

2. Some facts are required to be stated to dispose of this second appeal and for this purpose the parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. There is no dispute that the parents of the Defendants sold to the Plaintiffs the eastern part of their property known as “Mordi” or “Collem Mordi” by Deed dated 18-3-1947. The said Deed, inter alia, stipulated as follows:-

> “Que os vendedores comprometem nao impedir a passagem pelo seu predio aos compradores e aos seus descendentes”.

When translated it reads as follows:-

> “That the vendors promise not to obstruct the passage through their property to the purchasers and their descendants”.

4. After the purchase, the Plaintiff No.1 constructed a house on the southern portion and Plaintiff No.2 constructed a house on the

northern portion. In due course of time, the Plaintiff No.1 and Plaintiff No.2 also constructed a wall separating their respective portions in accordance with the said Deed of Sale and again in due course of time the portion in occupation of Plaintiff No.1 came to be surveyed under No.19/4, the portion in occupation of Plaintiff No.2 under No.19/6 and the rest of the property of the Defendants under survey no.19/2 and 5. The Defendants also have their residential house in the said portion surveyed under no.19/2. The main road leading from Quepem to Amona is on the western side of the property which remained with the Defendants, without being sold.

5. The case of the Plaintiffs was that the nearest P.W.D. public road to the Plaintiffs was the said Quepem-Amona road and the access to the road passed through the part of the property of the Defendants which was surveyed under No.19/2. The Plaintiffs stated that this access was motorable having a width of 4 meters and starts from the said Qupem-Amona road and goes in west-east direction by the northern side of the house of the Defendants and then diverts in two parts at the rear side of the house of the Defendants, one leading to the house of Plaintiff No.1 and the other leading to the house of Plaintiff No.2. The Plaintiffs stated that the said access was clearly a beaten track and was existing well over 40 years i.e. since even prior to the purchase of the respective plots by the Plaintiffs and that the predecessors in title of the Defendants, in the said Deed of Sale, had clearly agreed to maintain the said access for the use of the Plaintiffs

and their families without creating any obstruction and that even while constructing the compound wall by the side of the road the vendors had maintained the suit access open for free use and had not even fixed any gate at the entrance. The Plaintiffs had stated that they and their families have been using the said access freely and openly since 1947 and that trucks to carry material for the construction of their respective houses were taken by the Plaintiffs by the said access and so also the materials for compound wall were also carried by truck loads by the said access. The Plaintiffs also stated that they were taking pick-ups and other vehicles to carry ash and other manure to their paddy fields etc. from their residence by the suit access ... etc. The Plaintiffs stated that they were using the said access as of right and they were entitled to use the same freely and the Defendants were not entitled to create any obstruction or to narrow down the same. The Plaintiffs stated that in the month of March, 1988, the Defendants tried to narrow the width of the said access by fixing wooden poles near the compound wall and although the Defendants were told to remove the wooden poles on both the sides of the entrance, the Defendants did not pay any heed. Therefore, the Plaintiffs filed the suit for permanent injunction to restrain the Defendants from raising or creating any obstruction on the suit access or from narrowing the width of the same or interfering in any manner with the suit access ... etc.

6. On the other hand, it was the case of the Defendants that the eastern portion was sold by their parents to the Plaintiffs in common, each of them having half share and the passage mentioned in the Sale Deed was meant as a footpath for the Plaintiffs to have access to the municipal road as shown by the Defendants on the plan annexed. In other words, it was the case of the Defendants that the passage mentioned in the Sale Deed was meant as a footpath for the Plaintiffs to have access to the municipal road as shown by them on a plan connecting the main Amona-Quepem road and in recognition of the said footpath the Defendants had kept a passage adjoining the northern side of the plot sold to the Plaintiffs which is recorded in the survey under no.19/3 but that the said passage was not in use by the Plaintiffs ever since a separate kutcha road was provided as access to them adjoining the eastern side of the Plaintiffs property and the passage kept by the Defendants was used by them whenever they required to go to the house lying on the eastern side of their plot.

7. In other words, the Plaintiffs claimed the passage mentioned in the Deed as a passage through the property of the Defendants surveyed under no.19/2 while according to the Defendants the said passage was through survey no.19/3 which proceeded further eastward and then connected the said Quepem-Amona road. Plaintiff also claimed that the said passage was 4 meters wide.

8. Both the parties led evidence to support their respective claims i.e. to show the direction of the passage which was mentioned in the Sale Deed dated 18-3-1947.

9. The learned trial Court found the evidence led by the Plaintiffs as more probable and proceeded to decree the suit. This, the learned trial Judge did after making an observation that the Sale Deed dated 18-3-1947 was ambiguous as to the direction of the passage and its width. The first appellate Court held that the said Sale Deed was silent on the location of the access as well as its width, and in my view rightly. The learned first appellate Court further observed that the question which arose between the parties was whether the said access/passage was situated towards the northern side of survey no.19/4 as claimed by the Defendants or whether the same was through the property of the Defendants surveyed under no.19/2. The learned first appellate Court, however, found that the learned trial Court had discussed and marshalled the evidence elaborately and had come to the conclusion that the Plaintiff had proved that he has a right of way through the property under survey no.19/2 and that the Defendants had obstructed the same and, therefore, felt that there was no reason to interfere with the findings given by the learned trial Court. In making the said observations, the first appellate Court probably had in its mind the case of Plaintiff No.1 alone who was examined as P.W.1 and not of Plaintiff No.2 who was not examined in support of her claim.

10. This second appeal was admitted by Order of this Court dated 13-8-1999 on three questions as substantial questions of law which were otherwise found formulated in the grounds in Memo of Appeal under para 9(i), (iii) and (v). At the time of hearing on behalf of the Defendants, two more questions are sought to be raised by application dated 19-8-2004 stating that the said questions could be raised under sub-section 5 of Section 100 C.P.C. These questions are:-

> a). Whether, the reliefs of injunction could at all have been granted in view of the provisions of Section 41(e) of the Specific Relief Act, 1963, and
>
> b). Whether, the impugned Judgments and Decrees are vitiated on account of placement of reliance upon inadmissible evidence?

11. Mr. V. P. Thali, learned Counsel of the Plaintiffs/Respondents has contested the said application and the framing of the said additional questions (a) and (b) as mentioned in application dated 19-8-2004 as well as the third question framed on 13-8-1999 by submitting that they are not at all substantial questions of law. Mr. Thali, learned Counsel has submitted that the said three questions are not pure questions of law because they have to be

decided on facts proved in a given case and in any event they are not substantial questions of law.

12. What is a substantial question of law in a given case has been considered by the Supreme Court in various decisions. In the case of **Kondiba Dagadu Kadam** v. **Savitribai Sopan Gujar and others**((1999) 3 SCC 722) the Supreme Court has clearly stated that a second appeal can now be filed only if a substantial question of law is involved in a case and the memorandum of appeal must precisely state the substantial question of law and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of the hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. If the question of law termed as a substantial question of law stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal.

The Supreme Court further held that the High Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found that the calculations drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court or was based on inadmissible evidence or arrived at without evidence(Emphasis supplied).

13. In the case of **Smt. Phuljhari Devi** v. **Mithai Lal and others** (AIR 1971 Allahabad 494) a learned Single Judge of the Allahabad High Court held that a plea that a particular contract is void for uncertainty under Section 29 of the Contract Act being one of pure law can be raised for the first time at the hearing of the second appeal.

14. In the case of **Kshitish Chandra Purkai**t v. **Santosh Kumar Purkait and others** ((1997) 5 SCC 438 the Supreme Court stated that it is not every question of law that could be permitted to be raised in second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in sub-section (5) of Section 100 C.P.C. Under the proviso, the Court should be “satisfied” that the case involves a “substantial question of law” and

not a mere “question of law”. The reason for permitting the substantial question of law to be raised, should be “recorded” by the Court. Further, (a) it is the duty cast upon the High Court to formulate the substantial question of law involved in the case even at the initial stage; (b) that in (exceptional) cases, at a later point of time, when the Court exercises its jurisdiction under the proviso to sub-section (5) of Section 100 C.P.C. In formulating the substantial question of law, the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet the point. Proceeding to hear the appeal without formulating the substantial question of law involved in the appeal is illegal and is an abnegation or abdication of the duty cast on court; and even after the formulation of the substantial question of law, if a fair or proper opportunity is not afforded to the opposite side, it will amount to denial of natural justice. The above parameters within which the High Court has to exercise its jurisdiction under Section 100 C.P.C. should always be borne in mind.

15. In the case of **Santosh Hazari** v. **Purushottam Tiwari** ((2001) 3 SCC 179) the Supreme Court observed that Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on “substantial qustion of law involved in the case”. The phrase “substantial question of law”, as occurring in the amended Section 100 is not defined in the Code. The word “substantial”, as qualifying “question of law”, means – of having substance, essential, real, of sound worth, important or considerable.

It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The Supreme Court further stated that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

16. Admittedly, Section 91 of the Evidence Act,1872 is not at all in focus in this case because the very deed between the parties has been produced. Nevertheless reference to the case of **Roop Kumar** v. **Mohan Thedani** ((2003) 6 SCC 595) will not be out of context. The Supreme Court referring to both Sections 91 and 92 of the Evidence Act, 1872 stated that Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known sometimes as the "best-evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. It has been stated that the rule is in no sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process – the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely that dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be

proved at all the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to “prove” it or “give evidence” of it; otherwise, any rule of law whatever might be reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. As regards Section 92 of the said Evidence Act, the Supreme Court stated that in Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing. The Supreme Court further observed that Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document with limitation imposed by Section 92 relates only to the parties to the document. If after the document has been produced to prove its term under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91

would be inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91. However, the two Sections, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined to only bilateral documents. Both these provisions are based on “best-evidence rule”. In Bacon's Maxim Regulation 23, Lord Bacon said “The law will not couple and mingle matters of speciality, which is of the higher account, with matter of averment which is of inferior account of law.” It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. The grounds of exclusion of extrinsic evidence are: (i) to admit inferior evidence when law requires superior would amount to nullifying the law, and (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.

17. Reverting to the framing of additional questions as substantial questions of law as well as question no.3 as initially framed Mr. Sonak, learned Counsel placed reliance on Section 29 of the Indian Contract Act, 1872 and Section 41(e) of Specific Relief Act, 1963. Section 29 of the Indian Contract Act, 1872 deals with the agreements void for uncertainty, and, provides that agreements, the meaning of which is not certain, or capable of being made certain, are void. Likewise, Section 41 of the Specific Relief Act, 1963 deals with matters as to when injunctions should be refused and clause(e) of said Section 41 provides that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced.

18. In my view, the observations of the learned Single Judge in the case of **Smt. Phuljhari Devi** v. **Mithai Lal and others** (supra) will not stand the test laid down by the Supreme Court in the cases of **Kondiba Dagadu Kadam** v. **Savitribai Sopan Gujar and others** (supra) and **Santosh Hazari** v. **Purushottam Tiwari** (supra) and, therefore, has got to be considered as no longer good law. In my view, on the basis of law laid down by the Supreme Court in the cases of **Kondiba Dagadu Kadam** v. S**avitribai Sopan Gujar and others** (supra) as well as **Santosh Hazari** v. **Purushottam Tiwari**(supra) questions nos. 1 to 3 as well as question (a) cannot be termed to be substantial questions of law because they have no foundation whatsoever in the pleadings before the learned trial Court nor were

raised before the learned trial Court or before the first appellate Court and are being raised for the first time in this second appeal. The first three questions are mere propositions of law framed on the basis of Sections 93 and 91 of the Evidence Act, which are not at all applicable to the case, as will be seen little later. Same is the case with question (a) which is framed on the basis of Section 41(e) Specific Relief Act, 1963. As stated by the Supreme Court in the case of **Panchugopal Barua and others** v. **Umesh C. Goswami** (1997(4) SCC 713) appellants cannot be allowed to set up a new case in second appeal or raise new issue(otherwise than a jurisdictional one) not supported by the pleadings or evidence on record. As far as question (b) now proposed to be framed, the same in my view, is a substantial question of law because, as stated by the Supreme Court, in the case of **Sheel Chand** v. **Prakash Chand** ((1998) 6 SCC 683) concurrent findings of fact can be interfered in case there is perversity or illegality or as again stated in the case of **Kondiba Dagadu Kadam** v. **Savitribai Sopan Gujar and others** (supra) High Court can interfere with the findings of the Courts below when they are based upon inadmissible evidence or no evidence or as stated in the case of **Santosh Hazari** v. **Purushottam Tiwari** (supra) the evidence on which the so-called concurrent findings are based goes to the very root of the matter. In the circumstances, questions nos. 1 to 3 and question (a) now sought to be raised are held not to be substantial questions of law to be entertained in this second appeal.

19. In the case of **Swarn Kaur and others** v. **Jal Kaur and others** (JT 2001(5) SC 250) the Supreme Court has held that interpretation of Power of Attorney is a substantial question of law. In the case of **Becharbhai Lavjibhai and others** v. **Modh Patel Khushalbhai Ravjibhai** (AIR 1975 Gujarat 98) a learned Single Judge has held that extrinsic evidence can be considered while constructing a Sale Deed and such consideration raises a question of law and can be considered in second appeal.

20. As regards merits of the case, learned Counsel Mr. Sonak on behalf of the Defendants, has taken support from the observation of the learned trial Court that the Sale Deed was ambiguous and has submitted that the relevant clause in the Sale Deed as regards the passage, is vague, uncertain and ambiguous and, therefore, the Plaintiffs ought not to have been allowed to fill in the said ambiguity by producing evidence, and, the same principle would also apply to the Defendants as well because they too tried to produce extrinsic evidence to show that the passage was elsewhere than in the direction claimed by the Plaintiffs. Reliance has been placed by Mr. Sonak on a number of decided cases which I have perused.

21. On the other hand, it is the case of Mr. Thali, learned Counsel of the Plaintiffs, that there is no ambiguity in the said clause relating to the passage and that the parties were always free to show by leading evidence as to where was the said passage in relation to the

said clause of the Sale Deed. Mr. Thali, further submitted that if at all there was any ambiguity in the said clause it was a case of latent ambiguity which would always be made good by leading extrinsic evidence.

22. The relevant Sections which we would be concerned with are Sections 92, 93 and 95. Reliance has been placed on the first and the last Sections by Mr. Thali, while reliance has been placed on Section 93, by Mr. Sonak.

23. Section 92 of the Evidence Act, 1872 deals with exclusion of evidence of oral agreement, and, provides that when the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms. The sixth proviso which is relevant for our purpose reads as follows:-

> "Proviso 6 – Any fact may be proved which shows in what manner the language of a document is related to existing facts".

DATE: 4TH NOVEMBER, 2004.

24. Section 93 of the Indian Evidence Act, 1872 deals with exclusion of evidence to explain or amend ambiguous document, and, provides that when the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

25. Section 95 of the Indian Evidence Act deals with evidence as to document unmeaning in reference to existing facts, and, provides that when language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

26. I am unable to accept the submissions of Mr. Sonak, learned Counsel of the Defendants. On the contrary, I am inclined to accept the submissions of Mr. Thali, learned Counsel of the Plaintiffs, in that, there is no ambiguity or defect at all in the clause relating to the reservation of passage in the Deed, to the Plaintiffs. The words “ambiguous” has been defined by the Concise Oxford Dictionary, Ninth Edition as having an ebscure or double meaning, difficult to classify, and the word “ambiguity” has been defined as double meaning, either deliberate or caused by inexactness of expression, an expression able to be interpreted in more than one way. In the case at hand, there was no ambiguity as far as the reservation of the passage

was concerned and as rightly pointed out by the learned first appellate Court, the clause regarding passage was silent as regards its direction and width, and in my view, the parties were certainly entitled to and indeed led extrinsic evidence, without objection from one another to show in what manner the said passage related to existing facts i.e. its direction. This was permissible under the proviso 6 to Section 92, and both the Courts below have rightly concluded that the direction of the passage was from east to west through the property of Defendants surveyed under No.19/2. In this context, reference could be made to the case of **P. B. Bhatt and others** v. **V. R. Thakkar and others** (AIR 1972 Bombay 365) wherein this Court held that extrinsic evidence is admissible for the purpose of finding out the meaning of the words which have actually been employed or what is the same thing in order to translate the language of the document by assigning a definite meaning to terms capable of such explanation with a view to arrive at the true effect of the translation in question in cases in which the words used are such that one might suspect that they did not convey the intention correctly or in other words there is some doubt as to what the words mean or how they are to be applied to the circumstances of the writer or to the facts existing at the time when the document was executed.

27. The Plaintiffs did not claim that their suit was based on any easementary or customary rights but was based solely on the right of passage reserved to them by virtue of the said clause in the

said Sale Deed. Although, the Plaintiffs were entitled to lead evidence in terms of Proviso 6 to Section 92 of the Indian Evidence Act to show the direction and width of the said passage, the said evidence had to be of facts or events which were contemporaneous to the execution of the said Deed or as to facts which took place soon or shortly after the execution of the said Deed but certainly could not be based on facts which took place much much later after the execution of the said Sale Deed. In this context, reference was made to a decision of this Court in the case of **Belapur Co. Ltd.** v. **Maharashtra State Farming Corporation** (AIR 1969 Bombay 231) wherein this Court after relying on a decision in the case of **Bhaskar Waman Joshi and others** v. **Shrinarayan Rambilas Agarwal and others**(AIR 1960 SC 301) held that when the terms of a contract have been reduced to writing, extrinsic evidence as to what transpired subsequent to the contract is not admissible for ascertaining the terms. However, reference is required to be made to a later decision in the case of **Raj Kumar Rajinder Singh** v. **State of Himachal Pradesh and others** ((1990) 4 SCC 320) wherein the Hon'ble Supreme Court stated that the object of admissibility of evidence under the 6th proviso is to assist the court to get to the real intention of the parties and thereby overcome the difficulty caused by the ambiguity. In such a case the subsequent conduct of the parties furnishes evidence to clear the blurred area and to ascertain the true intention of the author of the document. If any authority is needed in support of this proposition reference may be made to the case of **Abdulla Ahmed** v. **Animendra Kissen**

Mitter(AIR 1950 SC 15) wherein it is stated thus:

> "The evidence of conduct of the parties in this situation as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties. Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument"(Emphasis supplied).

28. It is pertinent to note that the Sale Deed refers to the word passage (in singular) and not to passages (in plural). Admittedly, both the Plaintiffs had purchased the eastern part of the property of the Defendants jointly and what the Defendants or for that matter their predecessors in title had promised to the Plaintiffs was only one passage through their property to the buyers(Plaintiffs) and to their descendants. Without considering this vital aspect of the case, both the Courts below have decreed in favour of the Plaintiffs a right to two passages in the shape of Y and that too without Plaintiff No.2 being examined in support of her right to the said passage/s. Both the Courts appear to have been greatly impressed by the fact that the passage from Quepem-Amona road was a motorable road at least upto

the house of the Defendants but it had to be noted that this part of the passage, even if motorable, was of the Defendants and they were entitled to make free use of their own property as they wished. Admittedly, the word “passage” in the Deed was not preceded or qualified by the word “motorable”. The learned trial Court made no whisper as to why the Plaintiffs were entitled to a motorable access of 4 meters as claimed by the Plaintiffs. However, the learned first appellate Court relied upon the evidence of P.W.1, Luizina Azavedo and P.W.2, Minguel Fernandes to say that they had deposed that the access claimed by the Plaintiffs was a motorable one. The Plaintiffs had pleaded that the trucks to carry the materials for the construction of their respective houses were taken by the Plaintiffs through the suit access but before the Court, P.W.1, Luizina Azavedo, contrary to the said pleadings had stated that at the time of construction of their house, 47 years back, they had taken construction material by bullock carts through the said access. It is but common knowledge that at the time when the Deed was executed the common mode of carrying goods was by bullock carts. Although, the Plaintiffs had claimed the access/passage on the basis of Sale Deed dated 18-3-1947, the Plaintiffs had gone to the extent of pleading that they were using the same even prior to the purchase of the respective plots, thereby exposing the very falsity of their case. Both the Courts below failed to take note of the fact that they were interpreting a Deed which was executed in the year 1947 at the time when the only known mode of transport of goods was by bullock carts and at a time when even the

major roads or highways in this State were not 4 meters wide. In other words, the first appellate Court, as regards the width of the passage has relied upon evidence of facts which took place during car age to interpret a document executed in bullock cart age, if I may use that expression which was not permissible as per the law laid down in the case of **Abdulla Ahmed** v. **Animendra Kissen Mitter** (supra) as approved in the case of **Raj Kumar Rajinder Singh** v. **State of Himachal Pradesh and others** (supra).

29. In conclusion it may be stated that both the Courts below were right in accepting the evidence led on behalf of the Plaintiffs and in coming to the conclusion that the passage referred to in the Deed related to east-west direction as claimed by Plaintiffs. Extrinsic evidence to prove the location or direction of the passage was certainly admissible under proviso 6 to Section 92 of the Evidence Act. The conclusion of both the Courts below that each of the Plaintiffs was entitled for a separate passage has got to be considered as perverse not only because Plaintiff No.2 was not examined in support of her case but also because what was reserved to both the Plaintiffs in the Deed was a passage (in singular) and not separate passages(in the form of Y). The conclusion of the first appellate Court that the Plaintiffs were entitled to the said passage of a width of 4 meters is based on inadmissible evidence, as already stated. The son of Plaintiff No.1, Luizina Azavedo, might have acquired a motor-cycle later and might have used the said passage to pass with motor-cycle

to and fro and yet later on the Plaintiff No.1 might have taken pick-ups through the said passage but the same would not give the Plaintiffs a right to use the said passage reserved in the Deed as a motorable passage. The said passage with reference to the then prevailing facts could not have been interpreted as a motorable passage but at the most as a pathway or footway for the Plaintiffs to pass from the said eastern portion to the said Quepem-Amona road through the property of the Defendants. In view of subsequent developments like building of the wall separating the respective portions of Plaintiff No.1 and Plaintiff No.2, the said passage could be used by the Plaintiffs starting from the said point where the wall divides the respective portions of the Plaintiffs and then follow the direction towards the said Quepem-Amona road. Under no stretch of imagination the said passage as reserved in the Sale Deed could have been interpreted as motorable and, therefore, it can only be a pathway or a footway of not more than 1 meter width. The suit of the Plaintiffs shall, therefore, stand decreed only on the above terms and the Judgment/Decree of the learned trial Court modified to the above extent. Appeal partly allowed on the above terms with no order as to costs.

N. A. BRITTO, J.

RD.